

No. 12,128

IN THE

United States Court of Appeals
For the Ninth Circuit

ALBERT ADELMAN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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INTRODUCTORY COMMENT.

Appellant's contention is not correctly stated by either the Court below in its opinion (T. 13 and 14) or by appellee in its brief (p. 4).

Appellant simply contends:

1. That there is no tax on smoking opium imported into the United States, and as a corollary thereto,
2. That there is no "original stamped package" for such smoking opium.

These contentions of appellant were clearly set forth in his opening brief and will again hereinafter be sustained in appellant's comments on the contentions of appellee.

CONTENTIONS OF APPELLEE.

The contentions of appellee will be separately numbered and stated with page references to its brief and appellant's comment will follow each such contention.

I.

CONGRESS MAY TAX WHAT IT PROHIBITS—PAGE 2 WITH CASES CITED.

However, the government cannot charge that the defendant "did sell, dispense and distribute in or from the original stamped package a lot of smoking opium," when there could never be an "original stamped package", and the government is thereby bound by its own allegation.

II.

REPEALS BY IMPLICATION ARE NOT FAVORED—PAGE 4 WITH CASES CITED.

In making this argument, appellee assumes that the Harrison Narcotic Act does tax smoking opium. We seriously oppose the position that the Harrison Narcotic Act does tax smoking opium. It does not so state. As we stated in our opening brief, it only taxes items which are allowed to be admitted in conformity with the regulations in relation thereto.

However, while it is true that repeals by implication are not favored, according to the authorities, a

stated in *U. S. v. One Oakland Touring Automobile*, 9 Fed. (2d) 635, at p. 636:

“Plaintiff also counts upon section 3450 Rev. St. (Comp. St. § 6352). This statute relates to internal revenue taxes alone, and there are none on imported cocaine. Those imposed by the Harrison Anti-Narcotics Act (Comp. St. § 6287g) were repealed by the implication of the subsequent Drug Act prohibiting importation,”

and further stating,

“That statutes sanctioning activities and incidentally taxing them is irreconcilable with and is repealed throughout, incidentals as well as principal, by a subsequent statute prohibiting such activities and without any saving clause to perpetuate taxes. Of this rule of construction, also, the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{4}$ et seq.) is an illustration.”

There is also a further point in this: The Harrison Narcotic Act was passed in 1914, while the Jones-Miller Act was still in effect; therefore, it was not intended to including smoking opium in its scope, since that drug was already prohibited by the Jones-Miller Act and was not specifically mentioned in the Harrison Narcotic Act as being taxable—and, of course, the further point that if the Harrison Narcotic Act was intended to include smoking opium in the mentioning of the term “derivatives of opium” that inclusion was impliedly repealed by the subsequent re-enactment of the Jones-Miller Act in 1922 and in 1924, and the reasoning of Judge Bourquin in *U. S. v. One*

Oakland Touring Automobile, supra, is sound and applicable.

III.

THE HARRISON NARCOTIC ACT OF 1914 WAS HELD NOT TO AFFECT THE JONES-MILLER ACT—PAGE 6.

This statement and the case of *Gee Woe v. United States*, 250 Fed. 428, is favorable to our position under the alternative theory mentioned above; in other words, smoking opium, being absolutely prohibited by the Jones-Miller Act, that Act was in no way affected by the later passed Harrison Narcotic Act, and tends to show that smoking opium, prohibited by the Jones-Miller Act, was not intended to be taxed by the Harrison Narcotic Act.

IV.

MARKS v. UNITED STATES (C.C.A. 2, 1912), 196 FED. 476, HELD THAT THE 1909 ACT PROHIBITING THE IMPORTATION OF OPIUM FOR OTHER THAN MEDICINAL PURPOSES DID NOT REPEAL THE INTERNAL REVENUE ACT OF OCTOBER 1 1890, TAXING AND REGULATING THE MANUFACTURE OF SMOKING OPIUM.

This case is not in point at all. Here we are concerned with importing smoking opium and not manufacturing it as in the case cited by appellee.

V.

BOTH THE JONES-MILLER ACT AND THE HARRISON NARCOTIC ACT WERE AMENDED AND NO PROVISIONS IN REGARD TO SMOKING OPIUM IN THE JONES-MILLER ACT, OR DERIVATIVES OF OPIUM IN THE HARRISON NARCOTIC ACT WERE CHANGED, BUT WERE LEFT INTACT—PAGE 7.

This also proves nothing.

The fact that the Harrison Narcotic Act was reenacted with said provisions intact only shows that such provisions were in regard to opium derivatives of medicinal value, which were made legal to import under the regulations, and which were not prohibited, whereas, as stated in *Copperthwaite v. United States*, 37 Fed. (2d) at p. 848,

“The argument for distinction is that the importation of smoking opium was unconditionally forbidden, and hence that its importation must have been unlawful and every possessor must know it,”

and, as we strenuously contend, there could be no ‘original stamped package’ and thus there could be no tax assessed, for no one had a right to possess it in any manner.

 VI.

THE TARIFF ACTS OF 1922 AND 1930 DID NOT REPEAL OR AFFECT THE NARCOTIC DRUG IMPORT-EXPORT ACT—PAGE 7.

Again this proves nothing and the logic of appellant’s comment under V above is equally applicable.

VII.

APPELLEE'S COMMENT ON THE OPINION OF THE ATTORNEY
GENERAL, 27 AP. ATTY. GEN. 445—pp. 7 AND 8.

This attempt by the government to distinguish the opinion of the Attorney General does not destroy the logic and reasoning contained therein, and the opinion is still very forceful and applicable to the case involved. It states clearly the rule—that a taxing act on derivatives of opium is not intended to cover a drug that is to be summarily forfeited and thus reaffirming the opinion hereinabove quoted by Judge Bourquin in 9 Fed. (2d) at p. 636 and the 6th C.C.A. in *Copperthwaite v. United States*, supra, at page 848.

VIII.

APPELLEE'S COMMENT ON 26 U.S.C. 2567—pp. 8 AND 9.

Appellee's reasoning here is not in point. The fact that there is a tax on the manufacture of smoking opium is in no way inconsistent with the position that there is no tax on the importation of smoking opium. Title 26, Sec. 2567, provides for a tax on manufactured smoking opium. This relates to opium manufactured in the United States and in no way applies to opium manufactured outside of the country and brought in. It has no application to the charges in the instant case which relate to the sale of imported opium.

IX.

APPELLEE'S COMMENTS ON NG SING v. UNITED STATES
(C.C.A. 9), 8 F. (2d) 919 AND CHIN GUM v. UNITED STATES
(C.C.A. 1), 149 F. (2d) 575—pp. 10 AND 11.

There was no holding in either of the two above cited cases involving the points involved in the present case. The indictment in the *Chin Gum* case was brought under 26 U.S.C. 2554 (not having received a written order) rather than under 26 U.S.C. 2553(a) (not in original stamped package) and the holding in that case is, therefore, not against appellant.

CONCLUSION.

In conclusion, the fact that many narcotic indictments contain similar counts as were present in the Adelman case is not any argument why the government's position should be sustained. The question the Court must decide, while presenting a novel point, is nevertheless a logical one, and has the force of precedent of comparable construction, as contended for by appellant, by the Attorney General, and by two learned Courts, as hereinabove stated. It is not a case wherein one can freely sell smoking opium imported into the United States and not be amenable to law, as the Jones-Miller Act provides substantial punishment in relation thereto. As stated in the opening brief of appellant, in the construction of a penal statute, all reasonable doubts concerning its meaning ought to operate in favor of the appellant.

The judgment of the Court below on Counts I and III should be vacated and set aside.

Dated, San Francisco, California,
March 14, 1949.

Respectfully submitted,

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